State under section 271(d)." The legislative history of this provision (which, contrary to LDDS' suggestion, refers to BOCs, not RBOCs) confirms this right.

The Commission should also clarify that, notwithstanding any prohibition on the bundling of local exchange and interLATA services, BOCs are not prohibited from bundling intraLATA and interLATA toll services.[46] With the repeal of the MFJ and implementation of 1+ intraLATA toll dialing parity, any further distinction between interLATA and intraLATA toll is meaningless, both from a competitive standpoint and the perspective of customers.[47] In fact, if a BOC is prohibited from offering intraLATA and interLATA toll services as a package, it will be at a significant handicap in marketing intraLATA toll services.

Clearly, however, section 272(g)(1) permits a BOC affiliate to market and sell the BOC's local exchange service.[48] In addition, as LDDS argues, the affiliate must be permitted to offer any retail package it desires, including bundled discount packages, if it uses its own local exchange service that it provides by reselling the BOC's service, purchasing unbundled elements from the BOC, or through facilities it has constructed or acquired.

Ameritech submits that these proposals apply the statute in a way that properly harmonizes the rights of RBOCs to participate in the market for integrated services packages, including bundled discount offerings, with any concerns that BOCs could leverage market power in local exchange services to obtain unfair advantages in the provision of such offerings. Ameritech submits, further, that these proposals integrate the

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[46] No party appears to address this issue in their comments.

[47] Actually, insofar as the distinction was purely a legal fiction, it never had meaning to customers. As an AT&T executive recently remarked: "Most customers are like my mother. She thinks of a long distance call as any time she uses the phone to reach someone she can't see from her kitchen window." Remarks of Joseph P. Nacchio, Executive Vice President, AT&T Consumer and Small Business Division to Morgan Stanley Conference, Feb. 13, 1996.

[48] There is no reason for the Commission to prohibit a BOC affiliate from bundling a BOC's intraLATA toll service with the affiliate's interLATA toll offering, so long as local exchange service is sold separately.

joint marketing provisions, the nondiscrimination provisions of section 272(e) of the Act, as well as the requirement that the affiliate "operate independently" from the BOC.

2. Other proposed restrictions on joint marketing are unnecessary and at odds with the Act.

The joint marketing framework, described above, appropriately accommodates the rights of RBOCs to jointly market local, long-distance, and potentially other services in a meaningful way with concerns stemming from alleged BOC market power. It is also consistent with the language and intent of the statute. However, a number of other restrictions were suggested in comments of some BOC competitors. These proposed restrictions are aimed more at handicapping the BOCs than creating fair rules of competition. They also are at war with the plain meaning of the Act.

For example, MCI argues that BOCs should be prohibited from engaging in joint marketing on inbound calls. According to MCI, since section 274 of the Act explicitly permits joint marketing between a BOC and its electronic publishing affiliate on inbound calls, the lack of a similar provision in section 272 indicates Congress' contrary intent in that context. This argument is completely specious. Section 274 specifically authorizes joint marketing on inbound calls because that section otherwise generally prohibits joint marketing, subject to specified exceptions, one of which is for inbound calls. In contrast, section 272 contains no limitations on the ability of a BOC to joint market. Thus, there was no need for Congress to carve out exceptions to a limitation where no limitation exists.

Indeed, the exception in section 274 for inbound calls confirms the right of a BOC to jointly market the services of its section 272 affiliate on inbound calls. The fact that Congress saw fit in section 274 to establish a specific exception to its general joint marketing prohibition for inbound calls is sure evidence that Congress intended to permit joint marketing on inbound calls in section 272, which contains no general prohibition. In this regard, the claim of Time Warner and AT&T that BOCs should not be permitted

to jointly market services on some inbound calls -- namely, those from prospective customers -- cannot be squared with the Act.[49] Because section 274 establishes an exception for all inbound calls, it would be contrary to Congress' manifest intent for the Commission to read into section 272(g) narrower authority.

Notwithstanding Congress' clear direction, Time-Warner maintains that it would be "anticompetitive" to permit BOCs to engage in joint marketing to prospective customers on inbound calls. In support of this claim, it cites data showing that between 1991 and 1994, 17% of the American population changed residences (which translates into about 4.25% a year). This data is largely meaningless. Most customers who contact the BOCs for telephone service are likely to be well aware of the presence of alternative carriers. In fact, many BOC competitors have far greater resources available for marketing than do the BOCs. For example, in 1992, AT&T spent $1.6 billion just on advertising, an 85% increase from 1989.[50] This is an amount that represents 12% of Ameritech's total 1995 revenues. While Ameritech does not have more recent data on AT&T's advertising budget, surely it is far greater now than it was four years ago and will grow exponentially as AT&T enters new markets. This massive advertising budget is not only likely to negate any advantage BOCs could have with respect to prospective customers, it will give AT&T its own significant advantages in the marketplace.[51]

Equally unpersuasive is AT&T's claim that this restriction is compelled by the BOCs' equal access obligations, which, it asserts, continue to apply by virtue of section 251(g). This argument is based on a misreading of section 251(g). That provision states that federal and state equal access rules in effect before enactment will continue to apply only "until such restrictions and obligations are explicitly superseded by regulations

[49] See Time Warner at 23-24; AT&T at 57-58.

[50] See Motion of AT&T to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd 3271, 3305-06 (1995).

[51] Time-Warner, as well, will have advantages. It too has much deeper pockets than Ameritech, and when new customers call Time-Warner for cable television service, Time-Warner will be able to market telephone service to them as well.

prescribed by the Commission after such date of enactment."[52] The Joint Explanatory Statement makes clear that Congress did not intend for all aspects of the old equal access rules to continue in place: "When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding so that there is no confusion as to what restrictions and obligations remain in effect."[53] The Statement goes on to say: "The old consent decree obligations no longer exist with respect to post-enactment conduct, and the new obligations flow only from the statute."[54] With respect to joint marketing, Congress made clear that equal access obligations would not continue to apply. In particular, section 272(g)(3) provides that "[t]he joint marketing and sale of services permitted under this subsection shall not be considered to violate the nondiscrimination provisions of subsection (c)." This provision would have no meaning if the equal access provisions continued to apply to BOC joint marketing, since equal access is fundamentally a nondiscrimination obligation. Thus, to the extent equal access rules apply on an interim basis to BOC joint marketing, the Commission is obligated to modify those rules so that they are consistent with section 272(g)(3).

CompTel maintains that "Congress' purpose in enacting the joint marketing provisions are similar to those that motivated the DOJ in the Ameritech Customers First proceeding."[55] CompTel offers no evidence to support this assertion; rather, finding the joint marketing provisions in Customers First to its liking, it simply plucks them out of thin air and asks the Commission to incorporate them into the Act. Indeed, CompTel

[52] 47 U.S.C. § 251(g).

[53] Joint Explanatory Statement at 123.

[54] Id.

[55] CompTel at 24.

does not even accurately describe the joint marketing provisions of the Customers First waiver request.[56]

More importantly, these and the other restrictions proposed by CompTel cannot be reconciled with section 272(g). Indeed, if Ameritech were prohibited from marketing its long-distance offering either to existing or prospective customers, as CompTel proposes, Ameritech would not be able to joint market at all: there would be no one left to market to. Congress was certainly aware of the Customers First waiver request when it enacted the 1996 Act. There is no indication in the Act or its legislative history that Congress intended to codify these provisions. The Commission is not free to rewrite the statute to that effect.

AT&T asks that the Commission require BOCs to announce the availability and terms on which their affiliates will jointly market BOC services at least three months before such joint marketing may begin.[57] According to AT&T, this three-month rule would mirror the statutory requirement that LECs provide advance notice of technical changes in the network. This request, as much as any of the others made by AT&T, betrays AT&T's intent to misuse the regulatory process to gain competitive advantages. BOCs are required to give advance notice of technical changes in the network that affect interconnection because those changes are likely to require others to make corresponding changes in their own network. There is no reason why any carrier would require three months notice of joint marketing terms, even assuming those carriers had any desire to jointly market BOC local exchange services, as opposed to their own.

Some parties ask the Commission to prohibit BOCs and their affiliates from engaging in some of the functions inherent in joint marketing. AT&T, for example,

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[56] For example, its claim that Customers First would have prohibited Ameritech from advising existing local exchange customers that Ameritech or its affiliate provides interexchange service is flat-out wrong, as is its claim that the waiver would have prohibited Ameritech from transferring a call from a local exchange customer to its interexchange subsidiary. It also "colors" the terms of the waiver request in certain respects.

[57] AT&T at 55-56.

argues that BOCs should not be permitted to engage in joint planning or service development with their affiliates.[58] MCI suggests that joint sales calls be prohibited, along with making services available from a single source.[59] Others seize on language in the NPRM and argue that BOCs should not be able to engage in joint marketing at all, but, rather, must subcontract all joint marketing to an outside party.[60] These restrictions, they claim, derive from sections 272(b)(1) and/or (b)(3), which, respectively, require BOC affiliates to operate independently and have separate employees from the BOC.[61]

These arguments are based on a faulty construction of those separation requirements. Ameritech explained in its comments why the separate employee requirement does not prohibit the sharing of services. In particular, Ameritech explained that it is not uncommon in the telecommunications industry for employees of one company to market and sell the services of another. Ameritech noted that it has never been claimed that this renders that person an employee of both companies. While Ameritech offered these arguments in response to the Commission's request for comment on whether a BOC must out-source joint marketing activities, the arguments are equally valid with respect to claims, such as AT&T's, that joint planning and service development would violate the separate employee requirement.

Likewise, the general phrase "operate independently" offers no sound basis for ignoring the plain words of section 272(g) and Congress' stated intent to establish "parity" among carriers in the rules governing joint marketing. When Congress intended to limit joint marketing activities, it did so -- in section 274, for example. In section 272, in

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[58] AT&T at 20.

[59] MCI at 48, 49.

[60] Time Warner at 25; Sprint at 49. Significantly, Sprint concedes that the Act does not require such a result. Id. Indeed, it does not even offer a policy reason for it; it simply urges the Commission to impose this restriction, without explaining itself.

[61] It should be noted that there appears to be consensus in the record that each of these functions constitute joint marketing and thereby are encompassed by the term "market or sell." Certainly, no one makes any argument to the contrary.

contrast, Congress imposed no limits. On the contrary, its intent was to create parity among carriers. In the face of this clear manifestation of Congress' intent, the term "operate independently" offers no basis for bootstrapping into section 272 various joint marketing restrictions that apply uniquely to the BOCs. That would violate the well-established principle of statutory construction that specific terms in a statute prevail over more general ones that might otherwise have applied.[62]

3. The joint marketing restriction in section 271(e)(1) encompasses advertising, making services available from a single source, and providing bundled discounts.

There is broad consensus in the record that advertising the availability of interLATA and local exchange services, making such services available from a single source, and providing bundled discounts for the purchase of both services each constitute joint marketing and thereby fall within the purview of section 271(e)(1).[63] Only MCI takes a different view. MCI maintains that, since it is not required to establish separate subsidiaries for local and long-distance service, section 271(e)(1) should not be construed to prohibit joint advertising of such services or the selling of those services through a single source. According to MCI, Congress could not have intended to impose unnecessary costs on MCI. Ameritech is pleased with MCI's new-found sensitivity to the costs of regulatory restrictions. Nevertheless, the statute is clear on these points, as even Sprint and AT&T concede. The fact that MCI is not subject to separate subsidiary requirements is completely irrelevant to whether the three activities constitute "joint marketing." MCI's arguments should be rejected.[64]

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[62] See Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 228-29 (1957).

[63] See, e.g., Sprint at 47-48; AT&T at 53-54; TRA at 18-19; Ameritech at 48-49; Pacific Telesis Group at 40.

[64] It is ironic that, in the face of an explicit joint marketing restriction, MCI argues it should be permitted to make local exchange and long-distance services available from a single source, given that MCI argues that, despite section 272(g), BOCs should be prohibited from doing so even after they have received interLATA authority.

IV. THE COMMISSION SHOULD ADOPT ONLY THOSE NONDISCRIMINATION SAFEGUARDS THAT ARE REASONABLY REQUIRED BY THE ACT.

Certain commenters have advocated the imposition of major restrictions on BOC activity under the guise of implementing the nondiscrimination safeguards of sections 272(c)(1) and 272(e). To avoid anticompetitive results, however, the Commission should interprent the Act's nondiscrimination requirements reasonably in light of historical common carrier obligations applicable to the BOCs and in light of the specific language of the Act.

A. Rules Implementing Section 272(c)(1).

In the NPRM, the Commission inquired as to whether 272(c)(1) requires a BOC to provide a requesting entity with a quality of service or functional outcome identical to that provided to its 272(a) affiliate even if this would require the BOC to provide goods, facilities, services or information to the requesting entity that are different from those provided to the BOC affiliate.[65] Several parties have insisted that that is in fact the 272(c) requirement.[66] But such an interpretation is overbroad and inconsistent with the Act. It would require BOCs to ascertain what is necessary to achieve "identical functional outcomes" in an unknowable variety of situations. Moreover, it would theoretically obligate BOCs to provide a different service to a non-affiliate at the same price that it is charging an affiliate for another service even through the costs are different.[67] Yet that is completely at odds with the Act's section 252(d) cost-based pricing requirements for interconnection, unbundled network elements and reciprocal compensation arrangements.

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[65] NPRM at ¶ 67.

[66] See, e.g., AT&T at 31.

[67] See Sprint at 36, however, noting that it would be appropriate to reflect cost differences in the price.

If the Commission is concerned about the reasonableness of BOCs' responsiveness to the requests of non-affiliates for network capabilities -- the concern that appears to be raised by certain commenters[68] -- the BOCs' obligations under sections 251 and 252 of the Act are clear. Therefore, the Commission should decline to impose on BOCs under the aegis of section 272(c)(1) the requirement to provide different goods, services, facilities, or information. Instead, the Commission can evaluate, on a case by case basis, any complaints that the BOCs are unresponsive to the demands of non-affiliates for those different inputs in light of the other provisions of the Communications Act and the Commission's rules.

In response to the Commission's query concerning the interaction of 272(c)(1) and section 222 concerning customer proprietary network information ("CPNI")[69] certain parties have taken extreme positions. AT&T, for example, argues that a BOC's provision of CPNI to its affiliate would necessitate "making the same CPNI available to other interexchange carriers."[70] This, however, could fly in the face of the customer's desires and expectations and create an actual conflict with section 222. If, for example, a customer has specifically authorized the BOC to disclose CPNI to the BOC's 272(a) affiliate, it would defy all logic and common sense to either require the BOC to disclose the CPNI to any third party (assuming the customer has not authorized it) or to prohibit the BOC from disclosing that information to its affiliate (in the face of specific customer authorization).

B. Rules Implementing Section 272(e).

Paragraph 272(e)(1) addresses service intervals for fulfilling requests "for telephone exchange service and exchange access." The Commission correctly concluded

[68] See, e.g., AT&T at 32 discussing the responsiveness to BOCs to IXC requests for "new access arrangements that will allow or more cost effective interexchange services."

[69] NPRM at ¶ 76.

[70] AT&T at 34.

that the paragraph does not create any additional rights or obligations beyond those otherwise covered by other provisions of the Act or the Commission's rules.[71]

However, certain commenters have taken an extreme position with respect to the language of the provision. In particular, AT&T interprets the phrase "any requests" as precluding the BOC from filling any individual request from its affiliate in a period of time that is shorter than the longest period of time it takes to fill any individual request from a non-affiliate.[72] Such an extreme positions ignores reality. It ignores the fact that, although all orders might be filled within a reasonable guideline period, actual order fulfillment might vary from one case to the next depending on the location of the order to be filled, the demand at that particular location, and the personnel available at that particular time at that location to fill the order. A sudden surge of orders in a certain area -- e.g., to accommodate a political convention in a place such as Chicago -- could result in some delays that are not experienced in other locations. It also ignores the fact that an order from a non-affiliate could require new construction. In these cases, it would be patently unreasonable, and completely unnecessary from a policy perspective, to require the BOC to artificially delay provision of services to its affiliate to match the time period involved with an extraordinary order by a non-affiliate.

Rather, the correct reading is the one the Commission itself adopted -- that non-affiliates are entitled to nondiscriminatory treatment. Ameritech submits that if the average order fulfillment time associated with a BOC affiliate is not less than the order fulfillment time associated with non-affiliates by a statistically significant amount, then there is compliance.

Paragraph 272(e)(2) deals with the provision of facilities, services, or information concerning the provision of exchange access to a 272(a) affiliate. Ameritech submits

[71] NPRM at 84.

[72] AT&T at 36-37.

that, since all transactions between a BOC and a 272(a) affiliate are required to be reduced to writing and available for public inspection, the Commission need do nothing more to implement this requirement -- which is also clearly embedded in the 272(c)(1) non-discrimination requirement.

Paragraph 272(e)(3) requires the BOC to charge its 272(a) affiliate or impute to itself an amount "that is no less" than the amount charged any unaffiliated IXC for access to telephone exchange service and exchange access. The Commission reasonably concludes that there is compliance if the BOCs provide exchange and exchange access services under tariff and their affiliates purchase these services at tariffed rates or the BOCs impute these rates. AT&T has offered a twisted interpretation of this section that results in a perverted version of the MFJ's "equal charge" rule.[73] Instead of requiring a BOC to treat all customers the same, AT&T maintains that (e)(3) requires the BOC to charge its affiliate at a rate no lower than "the highest unit price that any interexchange carrier pays for a like exchange or exchange access service."[74] Of course this would preclude a BOC affiliate from taking advantage of volume discounts that are available to a large number of IXCs -- including AT&T. While it is understandable that AT&T would like to see a potential competitor hobbled with such "dead weight," its position is clearly beyond any rational interpretation of the statutory provision.

AT&T creates the specter, however, of BOCs' creating discount structures that only their affiliates could take advantage of.[75] The Commission should not attempt to address such a concern by articulating a rule at this time that might be over-inclusive or under-inclusive. Rather, it makes more sense to evaluate claims of non-compliance of this nature in the context of specific facts. Since all provision of services in question

[73] Until September 1, 1991, the MFJ required that "the charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, or within reasonable sub-zones of an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers."

[74] AT&T at 40.

[75] Id.

must either be tariffed or subject to publication under subsection 252(h), discriminatory arrangements will be easy to detect and, if an objection is raised, the Commission can make a ruling at that time based on specific facts.

Paragraph 272(e)(4) deals with BOC provision of "any interLATA or intraLATA facilities or services to its interLATA affiliate." In this case, Ameritech would agree with AT&T that this provision does not authorize a BOC to provide any interLATA services that are not otherwise authorized under section 272 -- i.e., 272(e)(4) is not a separate authorization of BOC provision of interLATA services that are not otherwise permitted.

V. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS ARE LIMITED BY THE LANGUAGE OF THE ACT.

In its comments, Ameritech demonstrated that interLATA information service waivers granted under the MFJ, which did not require that the activity be performed by an affiliate separate from the BOC, permanently exempt these activities from the separate subsidiary requirements of section 272.[76] This conclusion was based on the provisions of sections 271(f) and 272(a)(2)(B)(iii).

Some commenters disagreed with this conclusion. These entities argue that section 272(a)(2)(B)(iii) only permanently exempts from the separation requirement waivered "interLATA telecommunications services" and that this term does not encompass "interLATA information services."[77] This argument ignores the fact that "interLATA information services" are a subset of "interLATA telecommunications services and are "activities described in section 271(f)."[78] Therefore, by exempting from the separate subsidiary requirement for interLATA telecommunications services

[76] These waivered activities include multiLATA provision of telecommunications devices for the deaf ("TDD") and of enhanced 911 services (Ameritech at 64) which have been provided on an integrated basis by the Ameritech Operating Companies.

[77] See, e.g., MCI at 8-9 ("previously authorized interLATA telecommunications services never have to comply with the separate affiliate requirements [but] previously authorized interLATA information services...do have to come into compliance within one year.").

[78] Section 272(a)(2)(B)(iii) refers to activities described in section 271(f). There can be no dispute that interLATA information services are activities described in section 271(f). 47 U.S.C. § 153, subsections (20), (21), and (46).

"previously authorized activities" described in section 271(f), section 272(a)(2)(B)(iii) exempts, inter alia, previously waivered interLATA information services.

The language of the Conference Report reinforces this conclusion. Referring to section 271(f), the Report describes that section as "covering both interLATA services and manufacturing."[79] In fact, as the Commission pointed out, the "previously authorized activities" described in section 271(f) cover, inter alia, interLATA information services.[80] Just as Congress, when discussing waivered activities in the Conference Report, used "interLATA service" as shorthand for the subsets of that service, including "interLATA information services," it used the same shorthand in section 272(a)(2)(B)(iii).

There are several reasons why this interpretation of section 272(a)(2)(B)(iii) is the correct one. It explains why there is no mention of "previously authorized activities" under section 272(a)(2)(C) -- it would be redundant. Further, it gives meaning to 272(h) -- the transition period applies to waivered manufacturing activities since they are not a subset of interLATA service activities. Finally, this interpretation means that multiLATA TDD and enhanced 911 service will not have to be moved outside the BOC and, therefore, is consistent with other indications of Congress' intent.[81]

A few commenters take the position that an information service is an "interLATA information service" if there exists the possibility that it can be accessed from a distant LATA.[82] This position is as nonsensical as stating that a BOC's provision of a local network becomes its provision of an interLATA service because the local network can be accessed by a call from a distant LATA. If the BOC is not providing the transport across LATA boundaries, the service cannot be any type of BOC-provided interLATA service.

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[79] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 123 (1996) ("Joint Explanatory Statement."

[80] NPRM at ¶ 39.

[81] See Ameritech at 65.

[82] See, e.g., Sprint at 17-18.

If the mere possibility of access from a distant LATA transforms a BOC information service into an interLATA information service, virtually all information services would become interLATA. If all information services were considered to be interLATA, Congress would not have enacted rules specifically for interLATA information services. Obviously, Congress modified "information services" with "interLATA" because these were the only type of information services intended to be covered by sections 271 and 272. This is in sharp contrast to "electronic publishing," which is covered by section 274 whether it is offered on an interLATA or intraLATA basis.

As discussed in Ameritech's comments, "interLATA information service" is a term of art. It applies to the situation where the BOC provides transport across LATA boundaries bundled with its information service.[83] If an entity other than the BOC provides end-users with the interLATA transport, there is no interLATA information service. Rather, in this situation, there are two services being provided to the end-user -- interLATA service and information service.

MFS argues that RBOC provision of what it calls "Internet service" constitutes the provision of interLATA information service.[84] This argument is relevant to the NPRM, if at all, only to the extent it deals with the "interLATA nature of an information service."[85] Ameritech takes no position on the facts on the three RBOC offerings MFS addresses. However, if the BOC or its affiliate does not provide transport of the Internet call across LATA boundaries, on a direct or resale basis, the service cannot be deemed to be a BOC provided interLATA service of any kind.[86]

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[83] United States v. Western Electric Co., 907 F.2d 160, 163 (D.C. Cir. 1990).

[84] MFS at 7-8. Despite its assertion that a BOC provided Internet service is an interLATA information service, MFS goes on to state that it is not asserting that Internet services are "telecommunications services." Id. at 8. This statement undercuts MFS' entire argument, since the Act defines "interLATA service" as a service involving "telecommunications." See section 3(42).

[85] See NPRM at section IIIC.

The Commission has tentatively concluded that section 272(a)(1) allows a BOC to conduct all or some of its interLATA telecommunications services, interLATA information services, and manufacturing activities requiring section 272 separation through a single separate affiliate which meets the requirements of section 272.[87] Ameritech agrees with this conclusion -- as do the vast majority of commenters who addressed this issue.[88] One commenter, the Telecommunications Resellers Association ("TRA"), however, reads section 272(a)(1) to permit a BOC to use multiple affiliates to provide a single category of services but not to provide multiple categories of services through a single separate affiliate.[89]

Section 272(a)(1) expressly permits a BOC to conduct multiple services requiring section 272 separation through a single affiliate. The plain language of section 272(a)(1) requires only that the subject services be provided through one or more affiliates "that are separate from any operating company entity that is subject to the requirements of section 251(c)." The requirement is clear: the affiliate or affiliates must be separate from the BOC. The Act erects no separation requirement among section 272 services nor is there any other prohibition on more than one such service being provided by a single affiliate.

The legislative history of section 272(a)(1) unquestionably supports the Commission's tentative conclusion that Congress intended that activities subject to

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[86] So-called "teaming" arrangements, where the BOC provided intraLATA service to a customer in conjunction with an interLATA carrier who provided interLATA service to the same customer, were permissible under the MFJ. See, e.g., Letter for C. Robinson, Dept. of Justice, to K. Hardmann, Mobile Telecommunications Technologies Corp. at 2-3 (Dec. 12, 1991). Since they did not violate the interLATA prohibition of the MFJ, teaming arrangements do not violate the interLATA prohibition of the Act. In fact, section 274(c)(2)(B) specifically references "teaming arrangements."

[87] NPRM at ¶ 33.

[88] See, e.g., Ameritech at 63; TIA at 15; Sprint at 12; Yellow Pages Publishers Association at 2-3; U S West at 19; Pacific Bell at 4.

[89] TRA at 8.

section 272's separation requirement could be conducted through a single entity separate and distinct from the BOC.[90]

The definition of "electronic publishing" will presumably be delineated in greater depth during the forthcoming rulemaking for section 274.[91] Nevertheless, the Commission presently seeks comment on this term to differentiate between information services subject to the section 272 safeguards and electronic publishing services subject to the provisions of section 274.[92] Specifically, the Commission asks whether it should classify as "electronic publishing" services those services for which the carrier controls, or has a financial interest in, the content of information transmitted by the service.[93]

A service does not become "electronic publishing" merely because the carrier controls the transmission of the data and has a financial interest in the service.[94] Under such an approach, virtually all services transmitted over a carrier's network would become "electronic publishing" since carriers are not primarily in the business of distributing free information. Instead, a service should be classified as "electronic publishing" only if the service fits within the definition of the term as set forth in section 274(h)(1). Furthermore, the fact that a service does not explicitly fit within one of the exemptions set forth in section 274(h)(2) does not mean that the service constitutes electronic publishing. The statutory exemptions are "safe harbors" from the reach of section 274(h)(1)'s definition. Many other services outside of the enumerated exemptions are not electronic publishing.

Ameritech notes that the comments, taken as a whole, reflect very little support for the proposition that "electronic publishing" should comprise those services for which the

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[90] NPRM at ¶ 33, n. 64.

[91] See, Electronic Publishing NPRM at ¶¶ 23-31.

[92] NPRM at ¶ 53.

[93] Id.

[94] Ameritech at 70-72.

carrier controls, or has a financial interest in, the content of the transmitted information. In fact, the few significant comments submitted on this issue generally criticize this definition as overly broad.[95] No support appears to have been voiced for a return to the MFJ-sanctioned definition of electronic publishing, presumably due to the 1996 Act's supersession of the MFJ and the failure of the 1996 Act to incorporate the MFJ's definition of the term (as the Act did for "manufacturing" and "information services").[96]

A better test would look to whether the carrier "generates or alters" the content of the information. If the transmitted information falls within one of the categories listed in section 271(h)(1), the service would be classified as "electronic publishing" if the BOC generates or alters the content of the transmitted information. It is the control over the subject matter of the information (generation, alteration, editing, collating, etc.) and not the control over the physics of transmission which renders an activity electronic publishing. Many of the categories of activities exempted under section 274(h)(2) from the "electronic publishing" definition rely upon this important distinction.[97]

The Commission notes that section 272(a)(2)(B)(i) of the 1996 Act exempts from the section 272 separate affiliate requirement all of the incidental interLATA services listed in section 271(g) except so-called "store and retrieve" information services. The Commission then asks what, if any, non-accounting safeguards should be established for the BOCs' provision of section 271(g) services.[98] Many commenters agreed with Ameritech that no additional safeguards need to be adopted by the Commission[99] Many commenters also took that same position. However, a few commenters urged the

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[95] Pacific Bell at 14-15; U S West at 13-15.

[96] See Pacific Bell at 14-15.

[97] See, e.g., 47 U.S.C. § 274(h)(2), subparts (B), (C), (D), and (E).

[98] NPRM at ¶ 37.

[99] See Ameritech at 66; U S West at 18; Pacific Bell at 6-7; BellSouth at 24; USTA at 10.

Commission to impose the separate affiliate requirements and other safeguards on some of the exempted section 251(g) services.[100]

Congress clearly intended that all section 271(g) incidental interLATA services (other than "store and retrieve" services) be exempted from the section 272 separate affiliate requirement. The statute could not possibly be any clearer.[101] Congress intended that consumers would reap the benefits of increased efficiencies from providing these services on an integrated basis.

Those commenters wishing to impose section 272 separation on additional section 271(g) categories inappropriately rely on section 271(h). Section 271(h) cannot be read to reimpose a separation requirement upon services explicitly exempted from this obligation. Section 271(h)'s command to narrowly construe the section 271(g) categories provides no basis for imposing separation upon the five exempted categories.[102] Indeed, nothing within the language of section 271(h) would appear to even authorize new Commission regulations.

[100] Voice-Tel at 11; NCTA at 3-4; TRA at 10.

[101] Section 272(a)(2)(B)(i).

[102] Congress intended that the types of services qualifying for immediate interLATA relief (in-region and out-of-region) and exemption from the section 272 separation requirement (category 4 excepted) should be narrowly defined.

With respect to non-structural, non-accounting safeguards, there already exists a wide array of protections for ratepayers and competition. Pure price caps, applicable to most BOCs, prevent cross-subsidies and their harmful effect on customers of regulated services. As US West notes,[103] the combination of interconnection requirements imposed by the Commission's Open Network Architecture rules and the 1996 Act afford substantial protection to BOC competitors providing any of the services listed in section 271(g).

Respectfully submitted,

Gary Phillips
John Gockley
Richard Hetke
Steve Schulson
Michael S. Pabian

Counsel for Ameritech
Suite 1020
1401 H Street, N.W.
Washington, DC 20005
202-326-3817

Dated: August 30, 1996

[103] US West at 18-19.

CERTIFICATE OF SERVICE

I, Toni R. Acton, do hereby certify that a copy of the foregoing Reply Comments of Ameritech has been served on the parties listed on the attached service list, by first class mail, postage prepaid, on this 30th day of August 1996.

By: 

Toni R. Acton

Edwin N. Lavergne
Jay S. Newman
Ginsburg, Feldman and Bress, Chartered
Attorneys for Interactive Services Association
1250 Connecticut Avenue, NW
Washington, DC 20036

Herta Tucker
Executive Vice President
Association of Telemessaging Services, International, Inc.
1200 19th Street, NW
Washington, DC 20036-2412

Saul Fisher
Donald C. Rowe
Attorneys for NYNEX Corporation
1111 Westchester Avenue
White Plains, NY 10604

Mary McDermott
Linda Kent
Charles D. Cosson
Keith Townsend
United States Telephone Association
1401 H Street, NW
Suite 600
Washington, DC 20005

Frank W. Krogh
Donald J. Elardo
Attorneys for MCI Telecommunications Corporation
1801 Pennsylvania Avenue, NW
Washington, DC 20006

Genevieve Morelli
Vice President & General Counsel
Competitive Telecommunications Association
1140 Connecticut Avenue, NW
Suite 220
Washington, DC 20036

Danny E. Adams
Andrea D. Pruitt
Kelley, Drye & Warren, LLP
Attorneys for
Competitive Telecommunications Association
1200 19th Street, NW
Suite 500
Washington, DC 20036

Ruth S. Baker-Battist
Attorney for Voice-Tel
5600 Wisconsin Avenue
Suite 1007
Chevy Chase, MD 20815

Richard J. Metzger
General Counsel
Association for Local Telecommunications Services
1200 19th Street, NW
Suite 560
Washington, DC 20036

Peter Arth, Jr.
Edward W. O'Neill
Patrick S. Berdge
Attorneys for the Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, CA 94102

Albert Halprin
Joel Bernstein
Randall Cook
Attorneys for Yellow Pages Publishers Association
Halprin, Temple, Goodman & Sugrue
1100 New York Avenue, NW, Suite 650E
Washington, DC 20005

J. Christopher Dance
Vice President, Legal Affairs
Kerry Tassopoulos
Director, Government Affairs
Excell Telecommunications, Inc.
8750 North Central Expressway
20th Floor
Dallas, TX 75231

Thomas K. Crowe
Michael B. Adams, Jr.
Law Offices of Thomas K. Crowe, P.C.
Counsel for Excell Telecommunications, Inc.
2300 M Street, NW
Suite 800
Washington, DC 20037

Eric Witte
Attorney for the Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Cynthia B. Miller
Senior Attorney
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Alfred M. Mamlet
Philip L. Malet
Marc A. Paul
Steptoe & Johnson, LLP
Counsel for Telefonica Larga Distancia de Puerto Rico, Inc.
1330 Connecticut Avenue, NW
Washington, DC 20036

Blossom A. Peretz, Director
New Jersey Division of the Ratepayer Advocate
31 Clinton Street, 11th Floor
Newark, NJ 07101

Herbert E. Marks
Jonathan Jacob Nadler
Squire, Sanders & Dempsey
Counsel for the Independent Data Communications Manufacturers Assoc.
1201 Pennsylvania Avenue, NW
Washington, DC 20044

Daniel C. Duncan, Vice President
Government Relations
Information Industry Association
1625 Massachusetts Avenue, NW
Suite 700
Washington, DC 20036

Michael J. Shortley, III
Attorney for Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Mary E. Burgess
Assistant Counsel
State of New York Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

William J. Celio
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI 48910

Charles D. Gray
James Bradford Ramsey
National Association of Regulatory Utility Commissioners
1201 Constitution Avenue
Post Office Box 684
Washington, DC 20044

Teresa Marrero
Senior Regulatory Counsel
Teleport Communications Group, Inc.
One Teleport Drive
Staten Island, NY 10311

Edward Shakin
Lawrence Katz
Attorneys for the Bell Atlantic Telephone Companies
1320 North Court House Road
Eighth Floor
Arlington, VA 22201

Mark C. Rosenblum
Leonard J. Cali
Attorneys for AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

David W. Carpenter
Peter D. Keisler
Sidley & Austin
Attorneys for AT&T Corp.
One First National Plaza
Chicago, IL 60603

David N. Porter
Vice President, Government Affairs
MFS Communications Company, Inc.
3000 K Street, NW
Suite 300
Washington, DC 20007

Andrew D. Lipman
Mark Sievers
Swidler & Berlin, Chartered
Attorneys for MFS Communications Company, Inc.
3000 K Street, NW
Suite 300
Washington, DC 20007

Matthew J. Flanigan
Grant E. Seiffert
Telecommunications Industry Association
1201 Pennsylvania Avenue, NW
Suite 315
Washington, DC 20044-0407

Philip L. Verveer
John L. McGrew
Willkie Farr & Gallagher
Attorneys for Telecommunications
Industry Association
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter & Mow, P.C.
Attorneys for Telecommunications
Resellers Association
1620 I Street, NW
Suite 701
Washington, DC 20006

James D. Ellis
Robert M. Lynch
David F. Brown
Attorneys for SBC Communications, Inc.
One Bell Center
Room 3536
St. Louis, MO 63101

Walter H. Alford
John F. Beasley
William B. Barfield
Jim O. Llewellyn
Attorneys for Bellsouth Corporation
1155 Peachtree Street, NE
Suite 1800
Atlanta, GA 30309-2641

David G. Frolio
David G. Richard
Attorneys for Bellsouth Corporation
1133 21st Street, NW
Washington, DC 20036

Leon M. Kestenbaum
Jay C. Keithley
Kent Y. Nakamura
Norina T. Moy
Sprint Corporation
1850 M Street
Suite 1110
Washington, DC 20036

Joseph P. Markoski
Jonathan Jacob Nadler
Marc Berejka
Squire, Sanders & Dempsey
Attorneys for Information Technology
Association of America
1201 Pennsylvania Avenue, NW
Washington, DC 20044

Robert B. McKenna
Richard A. Karre
Gregory L. Cannon
Sondra J. Tomlinson
Attorneys for US West, Inc.
1020 19th Street, NW
Suite 700
Washington, DC 20036

Donna N. Lampert
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
Attorneys for California Cable
Television Association
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Lesla Lehtonen
Alan Gardner
Jerry Yanowitz
Jeffrey Sinsheimer
California Cable Television Association
4341 Piedmont Avenue
P.O. Box 11080
Oakland, CA 94611

Christopher J. Harvie
Howard J. Symons
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
Attorneys for National Cable Television Association, Inc.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004

Daniel L. Brenner
Neal M. Goldberg
David L. Nicoll
National Cable Television Association, Inc.
1724 Massachusetts Avenue, NW
Washington, DC 20036

Catherine R. Sloan
Richard L. Fruchterman
Richard S. Whitt
Worldcom, Inc.
d/b/a LDDS WorldCom
1120 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Peter A. Rohrbach
Linda L. Oliver
Kyle D. Dixon
Hogan & Hartson L.L.P.
Attorneys for Worldcom, Inc.
d/b/a LDDS WorldCom
555 Thirteenth Street, NW
Washington, DC 20004

Marlin D. Ard
Lucille M. Mates
John W. Bogy
Attorneys for Pacific Telesis Group
140 New Montgomery Street
Room 1529
San Francisco, CA 94105

Dave Ecret
Special Assistant to the Governor for Telecommunications & Utilities
Office of the Governor
Commonwealth of the Northern Mariana Islands
Capitol Hill
Saipan, MP/USA 96950

Thomas K. Crowe
Michael B. Adams, Jr.
Law Offices of Thomas K. Crowe, P.C.
Counsel for the Commonwealth of the Northern Mariana Islands
2300 M Street, NW
Suite 800
Washington, DC 20037

Brian Conboy
Sue D. Blumenfeld
Michael G. Jones
Willkie Farr & Gallagher
Attorneys for Time Warner Cable
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Duane W. Luckey
Ann E. Henkener
Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793